Questions Presented

1. Whether at a joint criminal trial the State may, in substantial compliance with the Confrontation Clause, introduce against both defendants substantive evidence of both defendants' interlocking confessions to the crime when those confessions thoroughly substantiate each other, exhibit no significant discrepancies, and are convincingly corroborated by physical, forensic, and photographic evidence.

2. Whether the admission of both defendants' confessions, with proper limiting instructions, substantially complied with the Confrontation Clause where the confessions interlock as to the date of crime, the motive, the participants, the target, and the defendants' respective roles in it and where both defendants confessed to the same citizen who was cross-examined at trial, despite the fact that the codefendant repeated his confession in greater detail, in which he attempted to minimize petitioner's culpability, during a videotaped interview with an assistant district attorney.

3. Whether the admission of a codefendant's confession at a joint trial with proper limiting instructions, if error, was harmless beyond a reasonable doubt, where the defendant himself fully confessed his participation in the crime to his childhood friend, where the codefendant's confession did not incriminate the defendant to a greater degree than his own confession, and where the physical, photographic, forensic, and ballistic evidence introduced by the State at trial corroborated the defendant's confession in minute detail.

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No. 85-5939

IN THE

Supreme Court of the United States

October Term, 1986

EULOGIO CRUZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

Statement of the Case

Introduction

On the morning of November 29, 1981, Victoriano Agostini was gunned down in the South Bronx gas station where he worked as an attendant. Several hours later petitioner Eulogio Cruz (Chino) and his brother, Benjamin Cruz, arrived at the nearby apartment of their childhood friend, Norberto Cruz (no relation to petitioner and his codefendant Benjamin Cruz). Petitioner's arm bore a bloody bandage, and both petitioner and Benjamin informed Norberto Cruz that they had robbed a gas station in the 40th Precinct and shot the attendant.

In Norberto's words at trial, petitioner, with Benjamin standing at his side, said:

> That they had gone to give [sic] a hold up to a gas station and that he started struggling with him . . .
>
> He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped up and fired at the man in the gas station.

As recounted at trial, Benjamin then said:

> That he saw the man bend over, take out the gun and fire. He fired at Chino and then he jumped up and fired at the man in the gasoline station.
>
> Q. Well, just for clarification, who fired at Chino? Did he tell you that?
>
> A. Yes, the man at the gasoline station. (J.A. 33-34).*

Months later, during his investigation of the March 15, 1982 murder of Norberto's brother, Jerry Cruz, New York City Police Detective George Wood interviewed Norberto. During the course of their April 27th conversation, Norberto told the detective of petitioner's and Benjamin's visit on the morning of the gas station homicide. After hearing this information, Detective Wood continued his investigation into the death of Jerry Cruz, and on May 3, 1982, Detective Wood was informed that Benjamin Cruz had appeared at the 48th Precinct and wanted to talk to him about Jerry's death. Detective Wood drove to the 48th Precinct and then drove Benjamin Cruz back with him to the 45th Precinct.

There, with a New York City Police Officer acting as Spanish interpreter, Detective Wood began questioning

* Numerical references preceded by "J.A." are to the joint appendix; those preceded by "H." are to the minutes of the pre-trial suppression hearing, and those preceded by "T." are to the minutes of the second trial

Benjamin Cruz about Jerry's death, and Benjamin blurted out, "I shot a guy who shot my brother, Chino, at a gas station on 149th" (J.A. 30; T. 81-82). Benjamin Cruz was then advised of his *Miranda* rights, and Benjamin, later that morning, after another reading of the *Miranda* rights, made a twenty-two-minute videotaped confession to an assistant district attorney, in which he described, in greater detail, the circumstances under which his brother, petitioner, had been shot.

On June 11, 1982, petitioner Eulogio Cruz was accused by the Bronx County Grand Jury of, *inter alia*, having caused the death of Mr. Agostini during the commission of a robbery (J.A. 3-8).* On May 9, 1983, the charges pending against petitioner were consolidated for trial with those pending against his brother, Benjamin Cruz, who had also been indicted for the murder of Victoriano Agostini and related lesser crimes (J.A. 9-10).

The Pre-Trial Hearings and the First Trial

On May 25 through May 30, 1983, an evidentiary hearing was conducted in the Supreme Court of the State of New York, Bronx County, before The Honorable Fred Eggert, to determine the admissibility of Benjamin Cruz' videotaped confession to a Bronx County assistant district attorney (J.A. 61-69). Benjamin Cruz asserted before the hearing court that his confession to the murder of gas station attendant Victoriano Agostini was involuntary. Benjamin testified that he was not present during the robbery/homicide. Rather, he claimed that on the day of the crime, while he pretended to be asleep, he overheard petitioner talking to one Jerry Cruz about the crime (H. 81-85). Ben-

* Petitioner was indicted for two counts of Murder in the Second Degree—intentional murder and felony murder committed during the course of a robbery. Petitioner was ultimately convicted under the felony murder count of the indictment.

jamin claimed that despite petitioner's threat to keep quiet, he subsequently went to the police and confessed "so [he] wouldn't get his family involved in this" (H. 84). Benjamin quickly became confused on cross-examination. Unable to explain how he could make a twenty-two-minute detailed, videotaped confession based on his overhearing a one-minute conversation between his brother and Jerry Cruz, he stated that he confessed because he was nervous and "it just came out like that" (H. 101-04). Benjamin was also unable to explain why his brother allegedly threatened him, when, according to his direct testimony, he had pretended to be asleep during petitioner's conversation with Jerry Cruz (H. 98-99).

Following the denial of Benjamin's motion, petitioner moved to sever his trial from his brother's. In support of his application for a severance, petitioner argued that if his brother's confession were admitted at their joint trial and if Benjamin did not testify, he would be denied his right to confront his accusers. In response to petitioner's claim, the State argued that petitioner himself had confessed his participation in the Agostini murder to a private citizen, Norberto Cruz, and his confession fully interlocked with Benjamin's confession. Thus, the prosecutor contended, the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968), would not be violated by a joint trial. The hearing court reserved decision on petitioner's motion for a severance (J.A. 14-17).

On June 7, 1983, petitioner and Benjamin Cruz proceeded, jointly, to trial. At this first trial, after Benjamin's videotaped confession was played for the jury, petitioner renewed his *Bruton* motion in the form of an application for a mistrial (J.A. 18). Justice Eggert denied petitioner's motion and, in a written decision rendered on June 10, 1983, the court held that the statements of petitioner and Benjamin Cruz "interlock fully as to the details of the crime and as to the full liability of each defendant for the crime charged" (J.A. 23, 26).

Petitioner's first trial ended when the trial court granted his motion for a mistrial due to juror misconduct (Minutes of June 14, 1983, pp. 3-4).

The Second Trial

On November 29, 1981, at 5:15 a.m., New York City Police Officers Dennis Fitzpatrick and Ronald Zuba were patrolling the 40th Precinct in Bronx County in their marked police vehicle when they received a radio transmission reporting a person injured (T. 35-36, 52-54). The two officers responded immediately to the Gaseteria service station on 149th Street and Prospect Avenue where they found the attendant, Victoriano Agostini, lying face down in a pool of blood, on the office floor (T. 36-37, 49). The police called for an ambulance, which took the mortally wounded attendant to a Bronx hospital where he died that day (T. 39-40, 58). Later that morning, at 8:00 a.m., detectives assigned to the New York City Police Department's Crime Scene Unit photographed the service station and searched for physical evidence (T. 180-83, 186-87).*

Less than five hours after the police discovered the grievously wounded Victoriano Agostini at the Gaseteria service station, petitioner and his brother appeared at the nearby apartment of Norberto Cruz (J.A. 32). Norberto, who was not related to petitioner or his codefendant brother, had been a friend of petitioner for twenty-five years and of the younger Benjamin Cruz for fifteen years, knowing both from their childhood in Puerto Rico (J.A.

* A series of photographs of the crime scene were introduced by the State at trial and have been submitted to the Clerk of this Court. The photographs reveal that Mr. Agostini had been lying on the floor behind a high counter in the service station's office.

31-32). Petitioner was visibly nervous and wore a bloodied bandage on his right arm (J.A. 32, 43).

When Norberto asked what had happened, petitioner, with his brother Benjamin Cruz standing beside him, stated that they had gone to hold up a gas station and that he became involved in a struggle with the attendant. Petitioner related that while he fought with the attendant, the latter bent down, pulled out a gun and fired. According to petitioner, his brother Benjamin then "jumped up" and shot the attendant (J.A. 33). Benjamin Cruz then told Norberto that he tried to "search" the attendant but that he "hadn't done it well" (J.A. 34). Benjamin stated that the attendant bent down, took out a gun, and fired at petitioner (J.A. 34). Benjamin told Norberto that at that point, he jumped up and shot the attendant (J.A. 34).*

When Benjamin completed his account of the shooting, Norberto offered to take petitioner to the hospital for treatment of his wound. Petitioner declined his friend's overture stating that, under the circumstances, a visit to the hospital would be too dangerous (J.A. 35). Petitioner and Benjamin then left the apartment with Jerry Cruz, Norberto's brother (J.A. 34, 41).

On the afternoon of the following day, Benjamin returned to Norberto's apartment, this time by himself (J.A. 36, 44). Benjamin told Norberto to clean the blood out of his car because it would be "very dangerous for Jerry" to leave his car in that condition (J.A. 36).**

The Forensic and Ballistic Evidence

On the same day that Benjamin Cruz came to Norberto's apartment to remove the blood from Jerry's car, an autopsy was performed on the body of Victoriano Agostini by Dr. John Pearl, an expert in forensic pathology (J.A. 52). The autopsy revealed that the deceased had received blunt force injuries on the bridge of his nose, around his eyes, and on his right cheek and left shoulder. In addition, Mr. Agostini had been shot twice in the head. One bullet grazed his head above the right ear and was fired from a distance of between three to six inches. The bullet, which followed a downward and backward path, never entered the deceased's skull. Rather, it split into fragments and exited Mr. Agostini's head one and one-half inches from its entry point. The second bullet entered the left front part of Mr. Agostini's head and also followed a downward and backward path through the brain, to the right rear part of the head (J.A. 52-53). The bullet and fragments were removed from the victim's head and sent to the police department's ballistics lab. The fatal bullet was determined to be .38 caliber and could have been fired from a .357 Magnum revolver (J.A. 54).

Four months later, the Agostini homicide investigation continues.

On March 14, 1982, Norberto Cruz' brother was killed (T. 146). Detective George Wood, who was investigating the Jerry Cruz homicide, met with Norberto on the day after his brother was killed and again on several subsequent occasions (T. 146, 164, 206-09). On April 27, 1982, Norberto informed the detective of petitioner's and Benjamin's visit on the day of Victoriano Agostini's death (J.A. 42; T. 146, 208-09).

Six days later, Detective Wood was contacted by petitioner's brother Benjamin (T. 210). While Detective Wood was speaking with Benjamin through an interpreter, Benjamin suddenly stated that he knew nothing about the

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* The trial court instructed the jury that Benjamin's statements were "to be taken into consideration only against Benjamin Cruz" (J.A. 34).

** The trial court, once again, instructed the jury that this statement was admissible only against Benjamin Cruz (J.A. 36).

Jerry Cruz homicide, but that he had shot a man who had fired at his brother, Chino, in a gas station on 149th Street (J.A. 30; T. 68-69, 80-81, 95). After the police read Benjamin his *Miranda* warnings he agreed to speak to an assistant district attorney, on videotape, concerning the Agostini homicide (T. 82-83, 197-98, 203-05).

Benjamin's videotaped confession*

After again waiving his *Miranda* rights (J.A. 62-63), twenty-two-year-old Benjamin admitted that in November of 1981, he, petitioner, Jerry Cruz and another individual went to rob a gas station (J.A. 63). Benjamin announced the holdup and, when the attendant resisted, petitioner hit him on the top of the nose with his gun and a struggle developed (J.A. 63). Benjamin stated that when the attendant produced a gun and shot petitioner in the arm, petitioner "shot him like to burn the clothes very close" (J.A. 68). Benjamin then "went over" petitioner's shoulder, pointed his .357 Magnum right between the eyes of his victim and "pow," "shot [the attendant] in the head and . . . killed him" (J.A. 64). After Benjamin shot the attendant, the victim fell backwards. Benjamin and petitioner then took $62.00 and fled in a car driven by Jerry Cruz (J.A. 65).

Benjamin refused to tell the assistant district attorney where petitioner was although he had just seen him on the previous Thursday (J.A. 66). Benjamin also professed ignorance when asked where his brother lived and where he "hangs out" (J.A. 66). Benjamin stated that petitioner did not seek medical attention for his wound and that "we bandaged him and took care of him" (J.A. 68).

* The videotape was introduced into evidence and was played for the jury. Justice Cerbone warned the jury that the confession was only to be considered against Benjamin Cruz (J.A. 30).

Summary of Argument and Introduction

Petitioner, convicted in a State court of felony murder for the shooting, by his codefendant brother, of a gas station attendant during the course of a robbery, seeks to overturn the judgment affirmed by the New York State Court of Appeals. Now, despite the fact that hours after the crime, he and his brother, Benjamin Cruz, confessed in substantively identical fashion, in each other's presence, to their childhood friend (evidence that the prosecution offered through the testimony of a single witness, Norberto Cruz) and despite the fact that, three months later, his brother blurted out the same confession to a police officer engaged in the investigation of an unrelated homicide in another precinct, petitioner claims he should be afforded a new trial because the State presented evidence that Benjamin voluntarily recounted the same substantively identical confession, in greater detail, on videotape to an assistant district attorney, and in its course attempted to minimize petitioner's culpability.

1. Though the argument was not specifically advanced in the State courts, the State, as Respondent, begins by asserting, in reliance on the Court's intervening decision in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed2d 514, 106 S. Ct. 2056 (1968) and on the record made in the State courts, that all the confessions were substantially admissible against all parties as interlocking extrajudicial confessions made under circumstances so marked with trustworthiness as to overcome the presumption of unreliability that attaches to most accomplice confessions.

Last term, in accordance with the rationale of *Ohio* v. *Roberts*, 448 U.S. 56 (1980) and *Dutton* v. *Evans*, 400 U.S. 74 (1974) (plurality decision), all of the then-sitting Justices of the Court agreed that an accomplice's extrajudicial

confession may be used as substantive evidence against a codefendant if the accomplice is unavailable and if his extrajudicial confession bears sufficient indicia of reliability, or such particularized guarantees of trustworthiness as to render it admissible in substantial compliance with the purpose of the Confrontation Clause. *Lee* v. *Illinois*, 90 L.Ed.2d at 525. The majority reasoned that, due to a special suspicion the law casts on the extrajudicial utterances of apprehended accomplices, an accomplice's confession is presumptively unreliable. *Lee* v. *Illinois*, 90 L.Ed:2d at 526. The Court held, however, that the presumption of unreliability could be rebutted. *Lee* v. *Illinois*, 90 L.Ed.2d at 526.

An application of the rationale of *Lee* to the facts of this case demonstrates that Benjamin Cruz' confessions were so marked with particularized guarantees of trustworthiness as to overcome the presumptively unreliable character of most accomplice confessions. In fact, petitioner himself steadfastly asserted throughout the State court appellate proceedings that there was "little doubt at all that [Benjamin's] videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). Although petitioner apparently has abandoned this argument before the Court, there are a multitude of factors attesting to the correctness of petitioner's position as articulated in the State courts.

First, an examination of the content of Benjamin's videotaped confession reveals that it thoroughly substantiated petitioner's own confession of guilt. Indeed, each statement, independently of the other, establishes all of the essential elements of New York's felony murder statute. While Benjamin's videotaped statement was longer and more detailed, it did not contradict or modify petitioner's statement in any significant way. *Lee* v. *Illinois*, 90 L.Ed.

2d at 529-530. Since Benjamin's description of petitioner's involvement was thoroughly substantiated by petitioner's own confession and any variances in detail were insignificant, *Lee* v. *Illinois*, 90 L.Ed.2d at 529, the two statements clearly interlock. Thus, Benjamin's confession must be deemed to be extremely reliable substantive evidence on this basis.

Additional indicia of the reliability of Benjamin's confession appear in the objective evidence introduced by the State at trial, and in the videotape itself. Indeed, the physical, forensic, photographic, and ballistic evidence further corroborates the accounts given in the various confessions in a manner which leaves no doubt that the confessions accurately recounted the events of the murder. Moreover, the videotape allowed the jury to view Benjamin's demeanor and hear his words as he confessed. Thus, by itself, it offered such reliable evidence of voluntariness and non-leading inquiry as to ensure that his confession was not prompted by interrogators who knew the details of the crime beforehand.

Similarly, the circumstances surrounding Benjamin's confessions attest to their reliability. Here, unlike the scenario in which Edwin Thomas made his confession inculpating Millie Lee, Benjamin had no reason to believe that petitioner (or Norberto Cruz, for that matter) had inculpated him in the felony murder; he had not been embraced, kissed and implored to honor his promise to share the "rap" with petitioner; and he did not confess to interrogators who knew the details they were looking for. To the contrary, Benjamin approached the police and volunteered to give information regarding a completely different homicide in a different precinct, and then in the course of the interview blurted out, "I shot a guy who shot my brother, Chino, in a gas station on 149th." This statement

in substance said no more than his previous confession in petitioner's presence to Norberto Cruz, and consequently it added nothing (other than a vague reference to a street address) to what Detective Wood already knew about that crime from his conversation with Norberto Cruz. Thus, after his initial admission, it cannot be said that Benjamin confessed to interrogators who knew the precise details they were looking for. Nor can petitioner successfully maintain that Benjamin's confessions exhibit the natural post-arrest motivation to shift the blame elsewhere which normally renders a codefendant's incriminating statements inevitably suspect. *Bruton* v. *United States*, 391 U.S. 123, 136 (1968).

In the first place, Benjamin made his initial spontaneous confession while playing the role of helpful citizen. He was not under arrest at the time: indeed, he was not even in custody. Secondly, after Benjamin was arrested and again voluntarily confessed on videotape, he did all that he could to minimize petitioner's role in the crime. As related by Benjamin, petitioner did no more than aid in the robbery and fire a missed shot in self defense, while Benjamin fired the fatal shot, "pow," right between the eyes, in defense of his brother. Since it is unlikely that Benjamin knew the intricacies of New York's felony murder statute, it is obvious that he implicated his brother in the homicide unwittingly. Indeed, during his videotaped confession, Benjamin consciously refrained from aiding in petitioner's apprehension by disclaiming knowledge of his whereabouts and recent movements. As his later hearing testimony graphically demonstrates, at the time Benjamin confessed to what he perceived to be a shooting in defense of his brother, he did not realize that it might be to his advantage to shift the blame to petitioner, as he did when he testified

after consultation with counsel who knew the scope of New York's felony murder statute.

Finally, a severance and a grant of immunity to Benjamin would not satisfactorily cure the confrontation problem here. Indeed, from the State's point of view, such a remedy would be completely inappropriate, for New York is a transactional immunity state. N.Y. Criminal Procedure Law §§ 50.10, 50.20 (McKinney 1981).* Thus, a severance to enable Benjamin to testify with immunity at petitioner's trial would exact as its societal price the complete immunization of the shooter from any liability for this murder. When the Court balances the scales in this case, the State submits that it should afford this factor compelling weight in deciding what measures a state should adopt to ensure an accused's right to confront his accusers.

Thus, the State asserts, the circumstances surrounding the codefendant's confessions in this case more than suffice in combined indicia of reliability to provide such particularized guarantees of trustworthiness as to render them substantively admissible against petitioner in substantial compliance with the Confrontation Clause. For these reasons, the State urges the Court to affirm this judgment upon the broader ground afforded by *Lee* v. *Illinois*, *supra*, a precedent announced after the trial and State court appeals in this case had concluded.

2. Should the Court choose not to affirm on the broader ground now offered by the State and addressed by petitioner in his brief at pp. 13, 16-17, 19-20, 31, that the con-

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* New York Criminal Procedure Law § 50.10 defines "immunity" as follows:

> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture.

fessions are substantively admissible interlocking extrajudicial confessions, the State asserts alternatively, the Court may affirm the judgment upon a finding that the confessions are "interlocking" within the rule of *Parker* v. *Randolph*, 442 U.S. 62 (1979).

The State asserts that when, as here, a defendant not only admits his guilt, but does so in a manner which thoroughly substantiates the confession of his accomplice as to all the elements of the crime charged and as to the participant's roles in its commission, the defendant will not be devastated by the possibility that a jury will fail to adhere to the trial court's limiting instructions and hence, that the exception to that rule articulated in *Bruton* should not apply in such cases. *Parker* v. *Randolph*, 442 U.S. at 73. Here, since petitioner's own interlocking confession of guilt, "the most probative and damaging evidence that can be admitted against him," *Bruton* v. *United States*, 391 U.S. at 139-40 (White, J. dissenting), was placed before the jury, the likelihood of a devastating spillover effect was eliminated. Therefore, there is no sound reason here for the Court to depart from the general rule that juries can be trusted to follow the trial court's clear limiting instructions. *Parker* v. *Randolph*, 442 U.S. at 75 n. 7; *Francis* v. *Franklin*, —— U.S. ——, 85 L.Ed.2d 344, 105 S. Ct. 1965 (1985).

Moreover, here the constitutional right of cross-examination would have little practical value for petitioner. *Parker* v. *Randolph*, 442 U.S. at 73. This conclusion flows both from the *Parker* plurality's observation that cross-examination is of less value to a defendant who, like petitioner, has confessed to the crime than to one who has consistently maintained his innocence, *Parker* v. *Randolph*, 442 U.S. at 72-73, and from the particular facts of this case. Here, not until the time of pretrial hearings did petitioner's

brother, Benjamin Cruz, realize that it would be in his interest to shift blame to petitioner. Thus, his hearing testimony, uttered one year subsequent to his videotaped confession and after having consulted with counsel, reveals that Benjamin now understood the scope of felony murder and could now predictably be expected to heap blame upon his brother. Under these circumstances it is clear that cross-examination of Benjamin at trial would only work to petitioner's disadvantage.

Nor should petitioner's argument that the difference in relative reliability between his confession to Norberto Cruz and Benjamin's confession on the videotape necessarily caused a spillover effect which overcame the limiting instructions be of sufficient weight to tip the scales in his favor. Though this record presents facts which are superficially similar to the hypothetical scenario posed by Justice Stevens in his dissent in *Parker* v. *Randolph*, 442 U.S. at 84-85, in fact the circumstances here are not nearly so dire as those posed by Justice Stevens, where X admitted to a drinking partner, a former cellmate, or a divorced spouse, that he had been with Y at the approximate time of the killing. In his brief, petitioner attempts to conform his case to the one posited by Justice Stevens' dissent, but in doing so, he blinks at the distinguishing factors that both his and his brother's confessions were recounted through the cross-examined testimony of a single witness, Norberto Cruz, and that Benjamin reconfessed in substantively identical fashion to the police, who were cross-examined at trial, before he finally recounted the same confession in more detail on the videotape. Moreover, there is absolutely no indication in the record before the Court that Norberto Cruz had a motive to "frame" petitioner. Similarly, petitioner is simply incorrect in his assertion that at the first trial Norberto Cruz stated that only Benjamin Cruz con-

fessed to the crime. The records of the first and second trial clearly reflect that Norberto had always maintained that petitioner and his brother confessed separately. In short, the record reveals that, contrary to petitioner's assertions, Norberto Cruz was a reliable witness who accurately recounted the substance of what the Cruz brothers had confessed to. Thus, unlike the situation where a presumably hostile witness vaguely recounts a single possibly incriminating circumstantial admission by one participant in a crime, here the Court confronts a case in which both participants confessed in each other's presence to a childhood friend having no obvious motive to bear them ill will and in doing so agreed on the date and target of the crime, the participants in it, the motive of robbery, and the essential facts of how petitioner was injured and the gas station attendant was killed.

Here, the State asserts that the indicia of reliability and particularized guarantees of trustworthiness which adorn the confessions in this case offer such substantial compliance with the purpose of the Confrontation Clause that they more than suffice to render these confessions admissible, with limiting instructions, in one proceeding as "interlocking" extrajudicial confessions within the meaning of *Parker* v. *Randolph*, *supra*.

3. As its third alternative argument in support of the judgment before the Court, the State asserts in closing, that error, if any, in the admission of Benjamin's videotaped interlocking extrajudicial confession was harmless beyond a reasonable doubt. The State agrees with Justice Blackmun's assessment that in most interlocking confession cases, any error in admitting the confession of a non-testifying codefendant will be harmless beyond a reasonable doubt, *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J.,

concurring in part) and asserts that this case is no vehicle in which the Court should depart from that general rule.

Here the State rested its case primarily on petitioner's confession to Norberto Cruz, "probably the most probative and damaging evidence that can be admitted against him." *Bruton* v. *United States*, 391 U.S. 139-40 (White, J., dissenting). In Norberto's words the State demonstrated how, bleeding from the gunshot wound in his arm, petitioner nervously confessed that he had robbed a gas station attendant, became involved in a struggle, that the attendant had bent down and shot him, and that his brother had jumped up and shot the attendant. Norberto's testimony was corroborated by forensic, ballistic, and photographic evidence, all of which had neither the motive nor the capacity to lie, and which clearly demonstrated that the struggle and shooting in the gas station had occurred as petitioner recounted it to Norberto Cruz. On this evidence alone petitioner's guilt of felony murder was more than sufficiently established under New York law. *See, e.g.*, *People* v. *Lipsky*, 57 N.Y.2d 560, 443 N.E.2d 425 (1982); *People* v. *Davis*, 46 N.Y.2d 780, 386 N.E.2d 823 (1978). Finally, the State proved that, at least as to Benjamin's confession to him, Norberto Cruz was truthful because Benjamin recounted it in, as to him, substantially identical fashion to the police.

In sum, the State urges that the Court affirm the judgment of the New York State Court of Appeals in this case. Here, the confessions sufficiently interlock to be admissible as substantive evidence of guilt in substantial compliance with the Confrontation Clause; *a fortiori* they interlock sufficiently to be admissible in a joint trial with limiting instructions; and—stronger still—in view of the evidence at trial the Court can, with a clear conscience, rule beyond a reasonable doubt that the admission of the videotaped

confession, by itself, did not so skew the balance between the State's interest in effective, accurate, and efficient law enforcement and petitioner's right to confront his videotaped accuser that the integrity of the truth-finding process at this criminal trial was compromised to a constitutionally meaningful degree.

ARGUMENT

POINT

THE INTRODUCTION OF PETITIONER'S CODEFENDANT'S VIDEOTAPED CONFESSION AT THEIR JOINT TRIAL WITH INSTRUCTIONS THAT IT WAS ADMISSIBLE SOLELY AGAINST THE CODEFENDANT WAS IN SUBSTANTIAL COMPLIANCE WITH THE CONFRONTATION CLAUSE WHERE THE CODEFENDANT ASSUMED PRIMARY RESPONSIBILITY FOR THE HOMICIDE AND DID NOT ATTEMPT TO SHIFT BLAME ONTO PETITIONER, AND WHERE PETITIONER HIMSELF MADE A NEARLY IDENTICAL CONFESSION WHICH THOROUGHLY SUBSTANTIATED AND FULLY INTERLOCKED WITH THAT OF HIS CODEFENDANT AND WHICH WAS FULLY CONSISTENT WITH THE PHOTOGRAPHIC, FORENSIC AND BALLISTIC EVIDENCE (U.S. Const. Amendments XIV, VI; N.Y. Penal Law § 125.25 subd. [3]). .

A. The videotaped confession of petitioner's brother, codefendant Benjamin Cruz, was substantively admissible against petitioner pursuant to this Court's decisions in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), and *Ohio* v. *Roberts*, 448 U.S. 56 (1980), since petitioner's brother was unavailable as a witness at trial, and his confession, in which he assumed primary responsibility for the homicide, was reliable.

For nearly a century, the Court has held that the primary mission of the Confrontation Clause is to advance

"the accuracy of the truth-determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. ——, 85 L.Ed. 2d 425, 105 S.Ct. 2078, 2082 (1985); *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Mattox* v. *United States*, 156 U.S. 237, 243 (1895). In striking a balance between the state's interest in effective law enforcement, legitimate correctional interests, and the development of precise rules of evidence, on the one hand, and the defendant's right to confront his accusers face-to-face, on the other, this Court has engaged in a pragmatic approach to a complex constitutional dilemma, ruling that when appropriate, an accused's right to confront, and thus cross-examine a particular witness must yield to the overriding need to ensure the integrity of the trial as the ultimate search for the truth. *New Mexico* v. *Earnest*, —— U.S. ——, 106 S.Ct. 2734, 54 U.S.L.W. 4868 (1986) (Rehnquist, J., concurring) (an accused's inability to conduct cross-examination of an accomplice does not necessarily render his statement inadmissible under the Confrontation Clause); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *California* v. *Green*, 399 U.S. 149 (1970). This case once again presents the Court with an opportunity to define the function of the Confrontation Clause and its scope in ensuring that only reliable evidence be admitted before the fact-finder.

Petitioner, who fully confessed his participation in the murder of a Bronx service station attendant to his life-long friend, Norberto Cruz, argues that the introduction of his codefendant's substantively indistinguishable confessions deprived him of his right to confront his accusers. Specifically, petitioner claims that the admission of his brother's videotaped confession deprived him of a favorable atmosphere in which the jury would have credited his assertion that he never confessed his guilt to Norberto Cruz. Thus, through misplaced reliance on the Confronta-

tion Clause, petitioner seeks to shield himself from extremely reliable evidence that would demonstrate the fallacious nature of his defense. *See Parker* v. *Randolph*, 442 U.S. 62, 73 (1980) (the Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a non-testifying declarant simply because it incriminates the defendant). This Court should refuse to countenance petitioner's attempt to rewrite the "mission" of the Confrontation Clause and warp the truth-determining process. *Tennessee* v. *Street*, 105 S. Ct. at 2082. Rather, the Court should hold that since petitioner's brother, Benjamin Cruz, was unavailable as a witness and because his confessions were inherently reliable and independently corroborated by the objective evidence introduced at trial, the Confrontation Clause permits their substantive admission against petitioner.*

Last term, in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986), all nine of the then-sitting Justices of the Court agreed that under the rationale of *Ohio*

* Although respondent did not argue, in the New York State courts, that Benjamin Cruz' statement was admissible against petitioner, this Court may nevertheless consider this issue since ". . . the prevailing party may defend a judgment on any ground which the law and the record permit . . ." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977); *see also Thigpen* v. *Roberts*, 468 U.S. 27, 82 L.Ed.2d 23, 104 S. Ct. 2916 (1984) (the Court may affirm on any ground that will not expand the relief granted below). Moreover, the issue of the admissibility of Benjamin Cruz' statement against petitioner is directly linked to petitioner's claim that the introduction of the statement violated this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). In light of the Government's concession in *Bruton*, the Court had no occasion to consider the admissibility of the codefendant's confession. *Bruton* v. *United States*, 391 U.S. at 128 n.3. Clearly, a finding that Benjamin Cruz' confession was substantively admissible against petitioner would necessarily defeat petitioner's *Bruton* claim. Therefore, since *Lee* v. *Illinois*, *supra*, had not been decided at the time of the State court proceedings, the Court should consider the State's argument, addressed by petitioner in his brief, that his codefendant's statement was admissible as an exception to the hearsay rule.

v. *Roberts*, 448 U.S. 56 (1980), an extrajudicial confession by an accomplice is admissible against a defendant if the accomplice is unavailable and if his statement bears sufficient indicia of reliability. *Lee* v. *Illinois*, 90 L.Ed.2d at 525. The majority reasoned, however, that due to the natural inclination of an accomplice to minimize his own criminal involvement and inculpate another, such admissions are presumptively unreliable. *Lee* v. *Illinois*, 90 L.Ed.2d at 526; *see Douglas* v. *Alabama*, 380 U.S. 415 (1965) (accomplice's confession which shifted blame onto the defendant is unreliable). While the Court in *Lee* held that the presumption of unreliability could be rebutted, it found that the statement of Lee's codefendant, Thomas, was demonstrably unreliable and therefore was inadmissible. In so holding, the Court rejected two separate arguments by the State in support of its position that Thomas' incriminating statements were admissible against Lee. First, the Court held that the "circumstances surrounding the confession" did not show such particularized guarantees of trustworthiness as would rebut the presumption of unreliability since Thomas' confession was motivated by a desire "to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders." *Lee* v. *Illinois*, 90 L.Ed.2d at 528.*

* The Court found not only that Thomas had a theoretical motive to inculpate Lee, "but that he was actively considering the possibility of becoming her adversary" by testifying for the State at her trial. *Lee* v. *Illinois*, 90 L.Ed.2d at 528. Thus, at the time he made his statement, Thomas, who was under arrest and in custody, was already attempting to minimize his involvement in the homicide. In contrast, Benjamin Cruz was not under arrest when he blurted out that he had killed the gas station attendant. It was only after he had already admitted the killing that Benjamin was arrested. Benjamin then made a full confession on videotape to an assistant district attorney in which he minimized petitioner's involvement and steadfastly refused to provide information regarding his brother's whereabouts. Clearly then, Benjamin Cruz was not attempting to shift blame to petitioner at the time he made these two confessions.

Additionally, the Court rejected the State's argument that Thomas' confession was reliable because it "interlocked" with Lee's own admission of guilt. The Court noted that the confessions were neither identical in all material respects nor truly interlocking since Thomas' statement inculpated Lee on the crucial issue of premeditation to a greater extent than did Lee's own confession. *Lee* v. *Illinois*, 90 L.Ed.2d at 529. In announcing the criteria for admissible interlocking extrajudicial confessions, the Court stated that:

> If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's involvement in the crime are not thoroughly substantiated by petitioner's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's statement may not be admitted.

Lee v. *Illinois*, 90 L.Ed.2d at 529. *See New Mexico* v. *Earnest, supra*, at n. (codefendant's admission may be shown to be reliable substantive evidence if it interlocks with the defendant's own confession).

An application of the rationale of *Lee* to the facts of the instant case demonstrates that Benjamin Cruz' confessions were extremely reliable. Indeed, petitioner himself has steadfastly maintained throughout the State court appellate proceedings that there was "little doubt at all that the videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). The State agrees with petitioner's position as articulated in the State courts. First, Benjamin Cruz' description of petitioner's involvement in the Agostini homicide was virtually identical in all

material respects to petitioner's own admission of guilt. Indeed, only hours after the shooting, petitioner and his brother appeared at the home of Norberto Cruz, a childhood friend from Puerto Rico (J.A. 32). Petitioner, visibly shaken and still wearing a blood-stained bandage on his arm, told his friend that he and his brother had just gone to rob a gas station and that he had become involved in a struggle with the attendant. Petitioner stated that the attendant bent down, pulled out a gun and fired at him, at which point his brother Benjamin "jumped up" and shot the attendant (J.A. 33). Then, as petitioner listened, his brother Benjamin gave Norberto a substantively identical account of the incident which petitioner did not contradict (J.A. 34). *See Lee* v. *Illinois*, 90 L.Ed.2d at 526 (a codefendant's confession is admissible against defendant where there are "circumstances indicating authorization or adoption"). Several months later, while being questioned by the police regarding an unrelated homicide, in a non-custodial setting, Benjamin spontaneously blurted out that he had shot a gas station attendant who had shot at his brother (J.A. 29-30). He then gave a full videotaped confession to an assistant district attorney admitting that in November of 1981, he and his brother went to rob a gas station; that his brother struggled with the attendant, hitting him on the nose with a gun and firing an errant shot very close to him; and that the attendant reached for a gun and shot petitioner in the arm (J.A. 63). Benjamin stated that he then "went over" his brother's shoulder and shot the attendant, killing him (J.A. 63-64).

A comparison of the two statements reveals that Benjamin's was, in all material respects, identical to petitioner's own confession. *Lee* v. *Illinois*, 90 L.Ed.2d at 535 (Blackmun, J., dissenting) (absolute identity in statements is not to be expected). Not only is there no doubt that the con-

fessions describe the same crime,* but each, independently of the other, established all of the essential elements of New York's felony murder statute. As the New York Court of Appeals aptly noted, the statements "agree on the date and target of the crime, the participants in it, the motive of robbery and the essential facts of how [petitioner] was injured and the gas station attendant killed" (J.A. 83). While Benjamin's videotaped statement was longer and more detailed (*i.e.* it stated the caliber of the guns used, the amount of money taken, and the number of perpetrators), it did not contradict or modify petitioner's statement in any significant way.** *Lee* v. *Illinois*, 90 L.Ed.2d at 529-30. Moreover, on the crucial issue of the role petitioner played in the homicide, Benjamin's statement mirrored his and petitioner's statement to Norberto Cruz. Since Benjamin Cruz' description of petitioner's involvement was "thoroughly substantiated" by petitioner's own confession in all material respects and any variances in detail were insignificant, *Lee* v. *Illinois*, 90 L.Ed.2d at 529, the two statements clearly interlock. Thus, Benjamin's confession must be deemed to be extremely reliable substantive evidence despite the lack of contemporaneous cross-examination. *New Mexico* v. *Earnest*, *supra*.

A multitude of factors attesting to the reliability of Benjamin's pre-hearing confessions to be found in the physical evidence underscores the validity of this conclusion. First, the photographic, ballistic, and forensic evidence introduced into evidence at trial extensively and convincingly corroborate the statements of petitioner and Benjamin Cruz with respect to the *modus operandi* of the crime.* For example, both petitioner and Benjamin Cruz described a violent struggle that developed between petitioner and the attendant when the latter resisted the robbery. The autopsy performed on the body of Victoriano Agostini disclosed that the deceased had suffered multiple abrasions on his face and shoulder which stood witness to this violent episode. Mr. Agostini had also received a laceration across the bridge of his nose, precisely the spot where, according to Benjamin's confession, petitioner had struck the victim with his gun (J.A. 52-53). Finally, the series of photographs introduced into evidence depicted the service station's office in disarray, confirming not only that a struggle took place, but that it occurred in precisely the area that both petitioner and his brother claimed.

Similarly, both petitioner and his brother stated that the attendant "bent down" to pull out a gun and that Ben-

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* The Second Circuit Court of Appeals has long held that the doctrine of interlocking confessions does not require identity in statements so long as it is clear that the statements describe the same criminal occurrence. *See e.g., Tamilio* v. *Fogg*, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041, 79 L.Ed.2d 170, 104 S.Ct. 706 (1984); *United States ex rel. Catanzaro* v. *Mancusi*, 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

** Several courts applying the doctrine of interlocking confessions have observed that minor differences in detail are acceptable and even to be expected, so long as the statements interlock on the major elements of the crime charged. *See e.g. United States* v. *Paternina-Vergara*, 749 F.2d 993 (2d Cir. 1984); *cert. denied sub nom. Carter* v. *United States*, —— U.S. ——, 84 L.Ed.2d 342, 105 S. Ct. 197 (1985) (statements are interlocking despite minor differences in details of the crime); *United States* v. *Kroesser*, 731 F.2d 1509 (11th Cir. 1984) (mere fact that codefendant's statement was slightly more detailed [regarding the location of the stolen currency] does not mean that the confessions are not interlocking since location of the money was not an element of the crime charged); *Tamilio* v. *Fogg*, *supra* (to be interlocking, statements need not be identical as long as they coincide as to the major elements of the crime charged).

* Petitioner, himself, argued in the New York State appellate courts and, indeed, in his petition for a writ of certiorari that Benjamin's confession was extremely reliable and that there was "little doubt at all that the videotape contained the truth" (Petitioner's brief to the New York Court of Appeals, p. 28). In fact, petitioner, employing an analysis similar to that utilized by the State herein, viewed each piece of objective evidence introduced by the prosecution at trial and concluded that it corroborated Benjamin's videotaped confession (Petitioner's brief to the New York Court of Appeals, pp. 27-28). Petitioner has apparently abandoned this argument before this Court.

jamin had to "jump up" to fire at his victim (J.A. 33-35). Again, the post-mortem examination of Mr. Agostini's body confirmed both brothers' descriptions of the actual shooting. Dr. John Pearl testified at trial that the fatal bullet followed a "downward and backward" path through the skull and brain of the deceased (J.A. 52-53). This testimony firmly established that the bullet was indeed fired from above and also corroborated Benjamin's assertion that he fired into the front of his victim's head after aiming "right between his eyes" (J.A. 64). In addition, the photographs of the crime scene revealed that Mr. Agostini was discovered lying in a pool of blood behind a high counter located in the service station's office. This not only confirmed Benjamin's statement that the deceased had fallen backwards after being shot, but explained why Benjamin had to jump up to fire at his victim, who had crouched down behind the tall counter (J.A. 54).

Benjamin's assertion that he shot the deceased with a .357 Magnum was partially corroborated by the ballistics evidence. At trial a ballistics expert confirmed that the .38 caliber bullet removed from the deceased's head could have been fired from a .357 Magnum revolver (J.A. 64; T. 234-35). Finally, both brothers' statements that petitioner had been shot by the attendant and that he did not seek medical treatment, but was instead bandaged by Benjamin, were fully corroborated by Norberto Cruz, who observed petitioner wearing the bloody, make-shift bandage only hours after the crime and whose offer to take petitioner to the hospital was declined as it would be "very dangerous" (J.A. 32-33, 35). Clearly, the degree to which the confessions are corroborated by the objective evidence introduced at trial thoroughly substantiates the conclusion that Ben-

jamin's confessions were wholly reliable.*/** *See United States* v. *Smith*, —— F.2d ——, slip op. nos. 85-5532, 85-5538 (4th Cir. 1986) (codefendant's statement is deemed reliable since it was supported by other evidence); *United States* v. *Ward*, —— F.2d ——, slip op. nos. 85-1632, 85-1637 (3d Cir. 1986) (same).

The additional circumstances peculiarly attending Benjamin's videotaped confession independently add to its reliability. Unlike the presumptively unreliable accomplice situation addressed by this Court in *Lee*, where a defendant suddenly finding himself under arrest sought to shift blame onto his accomplice, no such "blame-it-on-the-other-person and buck-passing posturing" occurred in this case. *Lee* v. *Illinois*, 90 L.Ed.2d at 531 (Blackmun, J., dissenting). Here, in contrast to *Lee*, where Thomas actively considered becoming a witness against the defendant, Benjamin Cruz never entertained the thought of testifying against his brother at the time he confessed both before and shortly after he was arrested. Indeed, in an obvious display of fraternal loyalty, Benjamin, who had seen his brother only days prior to his confession, refused to disclose his where-

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* While petitioner concedes, as he must, that the *modus operandi* described in Benjamin's confession was consistent with the forensic and physical evidence, he nevertheless erroneously asserts that the confession is unreliable since "[n]o evidence other than petitioner's own confession corroborated Benjamin's videotaped claim that petitioner was a member of the holdup team" (petitioner's brief, p. 19-20). Obviously, this argument ignores the fact that the interlocking nature of the two confessions [*see ante* at 22-25] is a recognized *indicium* of their reliability and accuracy. *See New Mexico* v. *Earnest*, *supra*; *Lee* v. *Illinois*, 90 L.Ed.2d at 528; *Parker* v. *Randolph*, 442 U.S. at 72-73. Furthermore, this claim is plainly in error since, as already noted, months prior to Benjamin's videotaped confession, Norberto Cruz observed petitioner in a nervous state wearing the tell-tale bloodied bandage that unequivocally linked him to the homicide.

** The fact that this corroborative evidence introduced against petitioner and his codefendant was elicited from the same witnesses underscores the State's interest in trying both defendants together. *Lee* v. *Illinois*, 90 L.Ed.2d at 532 (Blackmun, J., dissenting).

abouts to the assistant district attorney, and even professed ignorance when asked where his brother lived (J.A. 65-66). It was only one year later, at the time of the pre-trial hearings, that Benjamin Cruz finally exhibited the buck-passing posturing expected "once partners in a crime recognize that the 'jig is up'." *Lee* v. *Illinois*, 90 L.Ed.2d at 528. Benjamin's belated attempt to minimize his involvement not only underscores the reliable nature of his prior statements, but clearly reduced the "practical value" of cross-examination at trial. *Parker* v. *Randolph*, 442 U.S. at 73. Since it had become obvious at the time of the pre-trial hearings that Benjamin, now represented by counsel, would testify that petitioner was solely responsible for the homicide, petitioner's claim that he was denied an opportunity to cross-examine his brother is a hollow one (*see* minutes of the pre-trial hearing, pp. 80-85, 88, 95-96, 98). In any event, as petitioner has conceded in the New York State courts, there was no doubt that Benjamin's videotaped confession was truthful.*

* Petitioner's concession that Benjamin's videotaped statement was truthful is supported by the content of Benjamin's subsequent hearing testimony which was fraught with inconsistencies and was inherently unbelievable. For example, Benjamin testified that on the day of the crime, he overheard a one-minute conversation between petitioner and Jerry Cruz, in which petitioner confessed to the crime (H. 81-85, 105). Benjamin could not explain how, based on this brief conversation, he was able to make his detailed twenty-two-minute videotaped confession (H. 104-05). Benjamin also testified that he had pretended to be asleep throughout the conversation and when his brother and Jerry Cruz left the apartment (H. 88-90). On cross-examination, however, he testified that he spoke with his brother, who allegedly warned him to keep silent (H. 97-99). Benjamin stated that after hearing the confession, he went to see his mother (H. 90-91). However, it had been established at the hearing that Benjamin's mother did not come to New York from Puerto Rico until 1982 (H. 91). Benjamin also accused his brother of killing Jerry Cruz on the day of the gas station robbery/homicide (H. 103). This was obviously false, since it was established at trial that Jerry was killed nearly four months later (T. 146). Finally, Benjamin stated that he made his videotaped confession because he was nervous and that "it just came out like that" (H. 101).

Notably, even the circumstances leading up to Benjamin's confession reveal that he was attempting to implicate only himself in the Agostini homicide. After all, Benjamin himself sought out the police to aid their investigation of Jerry Cruz' homicide and spontaneously blurted out that he had shot a gas station attendant who had shot at his brother (J.A. 30). The fact that Benjamin's arrest was initiated by his choice to confess to the homicide significantly diminishes the possibility that he was seeking to cast blame on anyone but himself and thus renders his confessions unambiguously adverse to his penal interest.* *Lee* v. *Illinois*, 90 L.Ed.2d at 534; *Dutton* v. *Evans*, 400 U.S. at 88-89 (spontaneous inculpatory statement is deemed to be reliable); *Chambers* v. *Mississippi*, 410 U.S. at 300 (spontaneity of statement is a factor attesting to its reliability). Indeed, Benjamin's videotaped confession, although technically one made by an accomplice, bears none of the traditional indicia of unreliability associated with such statements. Thus, Benjamin's confession would seem to be more akin to a statement against penal interest, *Dutton* v. *Evans*, 400 U.S. at 88-89, than an accomplice's confession. Therefore, since Benjamin's videotaped confession falls within "a firmly rooted hearsay exception" it must be deemed to be extremely reliable. *Ohio* v. *Roberts*, 448 U.S. at 66. *Cf. Lee* v. *Illinois*, 90 L.Ed.2d at 528 n.5.

Benjamin's statements to the police immediately prior to his full confession also demonstrate his subjective intent to claim sole responsibility for the killing. For example,

* Not only did Benjamin consciously refrain from shifting blame to his brother, but he likewise declined to blame any of the other perpetrators for the actual shooting of the attendant. If Benjamin had been of a mind to blame someone else, the obvious candidates would be Jerry Cruz, who had since died, or the perpetrator he referred to as "Pacho," who had returned to Puerto Rico (J.A. 66-67).

Benjamin boldly told the two detectives interviewing him that he would kill them if he had a gun (T. 88). Thus, Benjamin obviously wanted to project the real or pretended image of a callous killer—an appearance clearly discernible in his videotaped confession in which he casually demonstrates how he killed the gas station attendant by "shooting him right between the eyes." Benjamin's violent demonstration and remorseless and indifferent demeanor hardly bespeak a man who was interested in shifting blame to another.* To the contrary, any fair reading of the transcript of his confession or viewing of the videotape itself leads to the ironic conclusion that Benjamin was very much interested in ensuring that the authorities were aware that he was the killer who defended his brother. Thus, while it is true that Benjamin stated that his brother fired a shot at the attendant, he made sure that his audience knew that his brother's shot missed,** that it was fired in response to the attendant's own shot, and that it was he who fired the fatal bullet (J.A. 63-64).

Significantly, the nature of Benjamin Cruz' statement, when viewed against the backdrop of the crime itself, reveals that he never realized that he was incriminating his brother in a homicide. Indeed, from Benjamin's perspective, it was he who was admitting that he committed murder, albeit in defense of his brother, and he referred to his brother only incidentally as one of several other accomplices present for purposes of committing a robbery. Only through a working knowledge of New York's complex

* Significantly, because Benjamin's confession was recorded on videotape, the jury had an opportunity to judge his demeanor in order to determine whether his statement was worthy of belief. *See California* v. *Green*, 399 U.S. at 157-58; *Mattox* v. *United States*, 156 U.S. at 242-43.

** Benjamin was apparently mistaken in his belief that petitioner's shot missed the attendant and merely burned the attendant's clothes "very close" (J.A. 68), since the autopsy revealed that the deceased suffered a second, superficial gunshot wound to the head (J.A. 52-53).

felony murder statute [N.Y. Penal Law § 125.25 subd. 3] could Benjamin Cruz have known that, by providing the prosecution with evidence of petitioner's intent to commit robbery he, in effect, implicated his brother in the resulting homicide. Since it is unlikely that Benjamin Cruz knew of the underlying rationale for felony murder and its legal intricacies, it is apparent that he inculpated his brother unwittingly.

Another powerful *indicium* of the reliability of Benjamin Cruz' confessions to the police and the assistant district attorney, and perhaps the most striking aspect of the present case, is the joint admission of guilt by petitioner and his brother on the day of the homicide. Only hours after the crime, petitioner and his brother stood side by side as each, in turn, described their deed to Norberto Cruz.* Obviously, the fact that six months prior to his verbal indiscretion to the police and to his later formal confession of guilt to an assistant district attorney, Benjamin had given a nearly identical recitation of the facts of the crime is a powerful indication that his latter statements were accurate and reliable. More important, however, is the fact that Benjamin's earlier statement was made in petitioner's presence, following petitioner's own explanation of the facts of the crime. The fact that both petitioner and his brother gave identical versions of the criminal episode, with neither contradicting the other, reveals that they were in total agreement and that each brother expressly authorized or adopted the confession of the other. *Lee* v. *Illinois*, 90 L.Ed.2d at 526 (codefendant's statement is admissible

* Petitioner told Norberto that they went to hold up a gas station and that he struggled with the attendant, who bent down and fired a shot at him. Then, according to petitioner, Benjamin "jumped up" and shot the attendant. Benjamin then added that he failed to properly "search" the attendant. Benjamin agreed that when the attendant bent down and fired at his brother, he "jumped up" and shot the attendant (J.A. 33-34).

against defendant where the latter authorizes or adopts the statement); Fed. R. Evid. 801(d)(2)(B). Since petitioner had adopted his brother's original confession to Norberto Cruz as his own, and since Benjamin's initial confession merely mirrored his subsequent videotaped confession, petitioner had already adopted the substance of the latter statement. Thus, its admission at trial simply could not have violated the Confrontation Clause.*

Finally, petitioner's assertion that Benjamin Cruz was available as a witness at trial and that his statement was therefore inadmissible [petitioner's brief, p. 19 n.8], is not borne out by the record of the trial proceedings.** In fact,

* While petitioner might argue that silence, in the face of his brother's statement, is not sufficient for a finding of an adoption [*see e.g. Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982)], petitioner was far from silent. Indeed, petitioner arrived with his brother at Norberto's apartment still bleeding from the wound he had received hours earlier and then gave Norberto a full account of what he and his brother had done. The fact that Benjamin's statement was uttered moments after petitioner's is irrelevant since, when both confessions are viewed together, it is obvious that the brothers were in total agreement. *See United States* v. *DiGiovanni*, 544 F.2d 642, 648 (2d Cir. 1976) (testimony of cellmate of two defendants, relating a three-way conversation in which defendants described a bank robbery, consisted of express admissions and adoptive admissions); *United States* v. *Bolden*, 514 F.2d 1301, 1311 (D.C. Cir. 1975) (remarks made by defendants to each other about details of violent episode in which they had just been involved would have been admissible against each defendant as adoptive admissions); *United States* v. *Steel*, 458 F.2d 1164, 1166 (10th Cir. 1972) (under circumstances where it would be natural to contradict the declarant, silence can be inferred to be an adoption of the statement); *Wickliffe* v. *Duckworth*, 574 F. Supp. 979, 984 (N.D. Indiana 1983) (defendant adopted codefendant's statement that they had just committed a murder since defendant was present, heard the statements being made, and never denied or contradicted them).

** It is worth noting that this Court has not required a showing of unavailability in all cases involving Confrontation Clause analysis. *Ohio* v. *Roberts*, 448 U.S. at 65 n. 7; *Dutton* v. *Evans*, 400 U.S. 74 (1980) (accomplice's statement is admissible despite the State's failure to demonstrate the unavailability of the declarant). Recently, in *United States* v. *Inadi*, 475 U.S. ——, 89 L.Ed.2d 390, 106 S. Ct. 1121 (1986), the Court held that the Confrontation Clause does not

(footnote continued on next page)

petitioner's brother, through his trial counsel, expressly advised the trial court that he would not testify at trial (T. 104). Clearly, it was apparent to the trial court and to the attorneys involved that if called as a witness, Benjamin Cruz would invoke his Fifth Amendment right to remain silent.

Benjamin Cruz' certain reliance on the Fifth Amendment rendered him unavailable to the prosecution as well as to petitioner, *Lee* v. *Illinois*, 90 L.Ed.2d at 532 (Blackmun, J., dissenting), since, under New York State law, it is clear error to call a codefendant to the witness stand when the party is aware that the codefendant will merely assert his Fifth Amendment privilege before the jury. *People* v. *Owens*, 22 N.Y.2d 93, 293 N.E.2d 715 (1968). Therefore, since Benjamin Cruz had made known the fact that he would not testify at trial, the State could not, in good faith, call him as a witness to test the sincerity of his refusal. In short, Benjamin Cruz was not available to the prosecution as a witness against petitioner. Nor would a severance and a grant of immunity to Benjamin satisfactorily cure the confrontation problem here.* Indeed, from

require the prosecution to show that a nontestifying co-conspirator is unavailable to testify as a condition for admission of his out-of-court statement. *United States* v. *Inadi*, 89 L.Ed.2d at 397-99. Although it is respondent's position that the prosecution clearly established the unavailability of Benjamin Cruz, the rationale employed in *Inadi* would seem to indicate that a showing of unavailability is not necessary in the instant case. *See United States* v. *Inadi*, 89 L.Ed.2d at 398-99. *Cf. Lee* v. *Illinois*, 90 L.Ed.2d at 531 n. 2 (Blackmun, J., dissenting).

* While petitioner, citing *Kastigar* v. *United States*, 406 U.S. 441 (1972) [petitioner's brief, p. 19, n.8] seems to suggest that the State had an obligation to bestow immunity on his brother and therefore render him available, this Court has never placed such a costly burden on the prosecution. Indeed, several of the Circuit Court of Appeals have held that the government has no duty to grant immunity under these circumstances. *See United States* v. *Wright*, 588 F.2d 31, 37 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States* v. *Alessio*, 528 F.2d 1079 (9th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976).

the State's point of view, such a remedy would be completely inappropriate, for New York is, by State statute, solely a transactional immunity state. N.Y. Criminal Procedure Law §§ 50.10, 50.20 (McKinney 1981). Thus, a severance to enable Benjamin to testify with immunity at petitioner's trial would exact as its societal price the complete immunization of the shooter from any liability for this murder. When the Court balances the scales in this case, the State submits that it should afford this factor compelling weight in deciding what measures a state should adopt to ensure an accused's right to confront his accusers.

In sum, Benjamin Cruz' statements interlocked fully with petitioner's own admission of guilt and were virtually identical in all material respects. In addition, they bore substantial indicia of reliability in that Benjamin never attempted to shift blame onto his brother. The statements were also corroborated by the forensic, ballistic, and photographic evidence introduced at trial. Since Benjamin Cruz was unavailable as a witness, his statement was admissible against petitioner. *Ohio* v. *Roberts*, 448 U.S. at 65. Indeed, in view of the nature of Benjamin Cruz' confessions, it is clear that he intended to accept full responsibility for the Agostini murder. His statement coincided with petitioner's own damaging admission of guilt with respect to the elements of felony murder and it did not modify or contradict his brother's admission in any significant way.* In short, nothing in Benjamin's statement added to peti-

* *Cf. Marsh* v. *Richardson*, 781 F.2d 1201 (6th Cir. 1986), *cert. granted*, —— U.S. ——, 90 L.Ed.2d 976, 106 S. Ct. 1888 (1986) (codefendant's statements diverge on the element of intent); *Fuson* v. *Jago*, 773 F.2d 55 (6th Cir. 1985) (statement unreliable where product of custodial interrogation with declarant having a motive to inculpate the defendant); *United States* v. *Parker*, 622 F.2d 298 (8th Cir. 1980), *cert. denied sub nom., Ward* v. *United States*, 449 U.S. 851 (1980) (statements diverged on location of the crime which was an essential element of the crime charged); *Mayes* v. *Sowders*, 621 F.2d 850 (6th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980) (unreliable where codefendant's statement is obviously self-serving).

tioner's confession with respect to his role in the robbery/homicide. Clearly, then, under the facts of this case, the presumption of unreliability associated with an accomplice's confession, was soundly rebutted. *Lee* v. *Illinois*, 90 L.Ed.2d at 527-28; *New Mexico* v. *Earnest, supra*.

Accordingly, when the Court balances the dubious additional value that cross-examination of Benjamin Cruz would have added to the integrity of the truth-finding function at this trial against the obvious benefits that proceeding against both defendants in one forum affords to society as a whole, the State submits it should give greater weight to society's concerns here. Here, the overwhelming bulk of the evidence at trial was offered through witnesses, many of them experts, who were common to both defendants. Thus, proceeding in one trial allowed for greater speed in the adjudicatory process, to the benefit not only of the court personnel, attorneys, and witnesses but also to the many other defendants who are incarcerated awaiting trial and are waiting for speedy justice in their cases.

Thus, the State submits that in this trial the balance falls in favor of a ruling that Benjamin Cruz' confessions should be substantively admissible and it urges the Court to make that ruling.

B. The admission of petitioner's codefendant's confession was in accordance with this Court's decision in *Bruton* since petitioner confessed his guilt to an extremely reliable witness thus eliminating the devastating consequences of the jury's unlikely failure to adhere to the trial court's repeated limiting instructions.

At trial, New York State Supreme Court Justice Joseph Cerbone repeatedly cautioned the jury that Benjamin Cruz' confession could not be used as evidence against petitioner (J.A. 30-31, 34, 36, 59). Thus, even if the Court were to

determine, as an evidentiary matter, that Benjamin Cruz' interlocking confession was inadmissible against petitioner as substantive evidence, it should nevertheless conclude that the jury was fully capable of understanding and following the trial court's limiting instructions and that as a result, petitioner suffered no constitutional prejudice in the admission of his codefendant's interlocking confession at their joint trial. *Parker* v. *Randolph*, 442 U.S. 62 (1979). Indeed, since "the assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue," *Tennessee* v. *Street*, 85 L.Ed.2d at 431 n.6, the admission of Benjamin Cruz' confession, under the particular circumstances of this case, was in accordance with petitioner's Sixth and Fourteenth Amendment right to confront his accusers.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), on which petitioner primarily relies, this Court carved out an exception to the general rule that juries adhere to a trial court's instructions. Thus, the *Bruton* court held that, notwithstanding the trial court's clear limiting instructions, the admission at a joint trial of a codefendant's extrajudicial admission of guilt, which incriminated the non-confessing defendant, violated the latter's right to confront his accusers. *Bruton* v. *United States*, 391 U.S. at 135-36. In overruling its earlier decision in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), the Court held that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

Bruton v. *United States*, 391 U.S. at 135. Noting the "devastating" effect a codefendant's confession has on a non-confessing defendant and the "inevitably suspect" nature

of an accomplice's confession, the Court ruled that limiting instructions could not be counted upon to prevent the jury from considering the codefendant's hearsay statement as evidence against the defendant. *Id.**

Twelve years after *Bruton* was decided, the Court, in *Parker* v. *Randolph*, 442 U.S. 62 (1978), considered the question of whether *Bruton* requires reversal of a defendant's conviction "where the defendant himself has confessed and his confession 'interlocks' with and supports the confession of his codefendant." *Parker* v. *Randolph*, 442 U.S. at 64. A plurality of the Court ruled *Bruton* inapplicable to cases involving interlocking confessions since "the incriminating statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in *Bruton* when the incriminated defendant has admitted his guilt." *Parker* v. *Randolph*, 442 U.S. at 73. The plurality also observed that the constitutional right of cross-examination has less practical value to a defendant who has confessed than to one who has consistently maintained his innocence. *Id.* Finally, the plurality concluded that the "natural motivation to shift blame onto others" which renders accomplice's confessions "inevitably suspect," *Bruton* v. *United States*, 391 U.S. at 136, does not apply where the defendant has corroborated his codefend-

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* The Court expressly noted in *Bruton* that due to the Government's concession, the question of whether Evans' confession was inadmissible against *Bruton* under traditional hearsay rules was not properly before the Court. *Bruton* v. *United States*, 391 U.S. 128 n. 3. Thus, the *Bruton* decision rests in part on the Government's concession that the codefendant's statement was inadmissible. As already discussed [*ante* at 18-35], it is respondent's position that petitioner's codefendant's confession was admissible against petitioner. The fact that the trial court instructed the jury not to consider Benjamin Cruz' confession as evidence against petitioner does not alter this Court's capacity to consider the evidence introduced at trial and determine whether Benjamin's confession qualified for admissibility under an exception to the hearsay rule. Should the Court find Benjamin's confession admissible, the *Bruton* rule would not apply, irrespective of the trial court's limiting instructions which suggest otherwise.

ant's statements by "heaping blame onto himself." *Parker* v. *Randolph*, 442 U.S. at 73.

The Court should adopt the rationale of the *Parker* plurality here since it is consistent with the integrity of the fact-finding process which *Bruton* sought to protect and would help to provide trial courts with workable guidelines in their consideration of pre-trial severance motions.* As

* The practicality of the plurality's approach is, no doubt, the reason why the majority of the Circuit Court of Appeals have adopted an "interlocking confession doctrine". The Second, Fifth and Seventh Circuits had developed an interlocking confession exception to *Bruton* prior to this Court's decision in *Parker*. *See, e.g., Mack* v. *Maggio*, 538 F.2d 1129 (5th Cir. 1976); *United States* v. *Spinks*, 470 F.2d 64, 66 (7th Cir. 1972), *cert. denied*, 409 U.S. 1011 (1972); *United States ex rel. Catanzaro* v. *Mancusi, supra; see also Montes* v. *Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980) (reaffirming reliance on interlocking confessions doctrine). The Fourth, Sixth and Eleventh Circuits have expressly adopted the *Parker* rationale. *See, e.g., United States* v. *Smith*, —— F.2d ——, slip op. nos. 85-5532, 85-5538 (4th Cir. 1986); *United States* v. *Marolla*, 766 F.2d 457, 460 (11th Cir. 1985); *Poole* v. *Perini, supra*. The Third, Eighth and Ninth Circuits have opted for a harmless error analysis. *See United States* v. *Ruff*, 717 F.2d 855 (3d Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984); *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 624 (9th Cir. 1980); *United States* v. *Parker, supra*.

Moreover, of the fourteen highest State courts that have considered the issue, nine have adopted the *Parker* plurality's rationale [*See State* v. *Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982); *Hays* v. *State*, 269 Ark. 47, 598 S.W.2d 91 (1980); *Washington* v. *United States*, 470 A.2d 729 (Dist. Col. App. 1983); *Fortner* v. *State*, 248 Ga. 107, 281 S.E.2d 533 (1981); *People* v. *Davis*, 97 Ill.2d 1, 452 N.E.2d 525 (1983); *State* v. *Bleyl*, 435 A.2d 1349, 1364-1365 (Me. 1981); *Commonwealth* v. *Bongarzone*, 390 Mass. 326, 455 N.E.2d 1183 (1983); *People* v. *Cruz*, 66 N.Y.2d 61, 70, 485 N.E.2d 221, 226 (1965); *People* v. *Smalls*, 55 N.Y.2d 407, 414-416, 434 N.E.2d 1063, 1066-1067 (1983); *State* v. *Thompson*, 279 S.C. 405, 308 S.E.2d 364, 365-366 (1983)]; three states have rejected the *per se* rationale of the plurality [*see Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979); *State* v. *Rodriguez*, 226 Kan. 558, 601 P.2d 686, 690 (1979); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980)]; and two states have continued to adhere to their own criteria for determining whether *Bruton* error will result [*See State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346 (1985); *State* v. *Pacheco*, 481 A.2d 1009, 1018 (R.I. 1984)].

already noted, the State has a strong interest in trying codefendants together since such trials conserve State funds, allow for greater speed and consistency in the adjudicatory process, [*Standefer* v. *United States*, 447 U.S. 10, 25 (1980) (the fact that different juries may reach different results is "discomforting")], and reduce the strain on crime victims, witnesses, and court personnel. Clearly, adoption of the plurality's rationale in *Parker* would serve to further the State's interests in substantial compliance with the Confrontation Clause. Contrary to the position urged by petitioner [petitioner's brief, pp. 23-24 n.11], a harmless error analysis would not properly reconcile the competing interests at issue here. Indeed, such a rule would require trial courts to sever the trials of codefendants even where both have fully confessed their participation in the crime charged. Thus, the State contends that where two or more defendants make interlocking confessions, and therefore cannot be "devastated" by the admission of a codefendant's interlocking statement, there is no reason to sever their trials.

Although the *Parker* plurality did not specifically define the parameters of an "interlocking" confession, the doctrine was again considered by the Court last term in *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S. Ct. 2056 (1986). In *Lee*, the concept of interlocking confessions was addressed in the more extreme context of substantive admissibility without limiting instructions. Thus, while the discussion in *Lee* is not necessarily applicable to a *Parker* situation, respondent suggests that the *Lee* decision sheds some light upon the meaning of an "interlocking confession" in the *Parker* context and addressed many of the concerns voiced in the concurrence and dissent in *Parker*. For example, Justice Blackmun's concern that "the two confessions may interlock in part only," "may cover only

a portion of the events in issue at trial'' or that one of the confessions ''may go far beyond the other in implicating the confessor's codefendant'', *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J., concurring), was directly addressed by the Court in *Lee*. Thus, under *Lee*'s discussion of substantively admissible ''interlocking'' statements, those statements that do not coincide on all material aspects of the crime or which diverge on the role of the participants in the crime, probably would not qualify as interlocking confessions for *Parker's* purposes. *Lee* v. *Illinois*, 90 L.Ed.2d at 528; *Parker* v. *Randolph*, 442 U.S. at 73. In much the same way, the two confessions envisioned by the *Parker* dissent in which defendant Y describes, in a television interview, how he and his codefendant X planned and executed the crime, while, in contrast, ''a drinking partner, a former cellmate, or a divorced spouse'' of codefendant X vaguely recalls X saying that he had been with Y at the approximate time of the killing, would not qualify as interlocking confessions under *Lee*. *Parker* v. *Randolph*, 442 U.S. at 84-85 (Stevens, J., dissenting). Whether interlocking extrajudicial confessions that meet the *Lee* standard, as the State submits the confessions in this case do, also meet the *Parker* v. *Randolph* standard for admissible interlocking extrajudicial confessions is the question presented by this case.

Clearly, where, as here, a defendant not only admits his guilt, but does so in a manner that thoroughly corresponds with the confession of his accomplice as to the essential elements of the crime, and as to the participants' roles in its commission, the defendant will not be devastated by the mere possibility that a jury will fail to adhere to the trial court's limiting instructions. *Parker* v. *Randolph*, 442 U.S. at 73. Indeed, as the *Lee* rationale demonstrates, the con-

fessions at issue here clearly interlock since Benjamin's confessions do not inculpate petitioner to a greater degree than his own confession of guilt, thus eliminating the likelihood of a devastating spillover effect. *Lee* v. *Illinois*, 90 L.Ed.2d at 529. Since the potential consequences of the jury's possible failure to adhere to the trial court's limiting instructions do not approach the situation addressed in *Bruton*, there is no reason for this Court to depart from the general rule that juries can be trusted to follow the trial court's instructions. *Parker* v. *Randolph*, 442 U.S. at 75, n. 7; *see Tennessee* v. *Street*, 471 U.S. ——, 85 L.Ed. 2d 425, 105 S. Ct. 2078 (1985) (jury is capable of following trial court's instruction that codefendant's confession, implicating respondent in the crime, is admissible only for rebuttal purposes); *Francis* v. *Franklin*, —— U.S. ——, 85 L.Ed.2d 344, 105 S. Ct. 1965 (1985) (''The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.'').

Clearly, the confessions at issue in this case interlock in their content [*ante* at 23-25]. Petitioner does not dispute this, but rather, claims that his confession to Norberto Cruz was inherently less reliable than his brother's videotaped confession to an assistant district attorney. Thus, petitioner erroneously concludes that the confessions do not fall within the interlocking exception to the *Bruton* rule. Petitioner is clearly incorrect.

As the New York Court of Appeals astutely observed, the statements at issue in this case were all extremely reliable (J.A. 84-85). Thus, while the relative reliability of codefendants' confessions might conceivably be a factor in determining whether confessions truly interlock, there is

no reason here for this Court to depart from established precedent and find petitioner's confession to be unreliable. Indeed, the fact that one defendant's confession is made to a cellmate or drinking partner, while the other defendant's statement is made to a police officer, does not automatically dictate a conclusion that the former is less reliable. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973) (statement made to a close friend shortly after the crime is deemed reliable); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (statement to a cellmate is held to be reliable); *see also Tamilio* v. *Fogg*, *supra* (statement by codefendant to a fellow prisoner interlocks with the defendant's own admission). Thus, the State contends that the primary inquiry in a case of interlocking confessions should focus on the content of the statements. Such an analysis would, by its terms, take into account the relative reliability of each confession, since, as the Court has observed in *Lee* and *Parker*, confessions which truly interlock carry certain indicia of reliability. The question of whether the witness who relates the statement to the jury is reliable should ordinarily be left to the fact-finder who, having heard the witness testify subject to cross-examination, is best equipped to decide the issue of credibility. While the State acknowledges that there may be rare situations where a trial court is confronted with a witness so demonstrably biased or otherwise unreliable as to call into question the accuracy or veracity of the alleged statement as a matter of law thus warranting a severance, the instant case presents nothing that even approaches that extreme situation.

Petitioner's claim that his brother's confession nailed shut his coffin is a mere diversionary tack aimed at distorting the reliable nature of his own damning confession. Indeed, while petitioner labels his visit to Norberto Cruz a

"casual social call" [petitioner's brief, p. 28],* it is hard to imagine a confession more trustworthy than a joint one made to a life-long friend in the immediate aftermath of a violent criminal episode by two of the participants in the crime. Moreover, as discussed previously [*ante* at 25-27], petitioner's assertions that a struggle developed; that the attendant bent down; that he was shot by the attendant; and that his brother had to "jump up" to fire, were all corroborated by the ballistic, forensic, and photographic evidence introduced at trial.**

In contradistinction, there is simply nothing in the record to corroborate petitioner's claim that Norberto had a

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* As petitioner points out, the probable reason for petitioner's visit to Norberto's apartment was to see Norberto's brother, Jerry, who was one of the perpetrators of the crime [petitioner's brief, p. 28, n.8]. This fact was established independently of Benjamin Cruz' confession since Norberto testified that he did not tell the police about petitioner's statement until after Jerry died, because Jerry "had the event" (J.A. 45). Contrary to petitioner's claim, it was clear from this testimony and from petitioner's ensuing cross-examination, that Norberto remained silent because his brother was part of the robbery team (J.A. 45). Moreover, the fact that on the day of the crime, petitioner and his brother came to Norberto's apartment, waited for Jerry to get dressed, and then left with him, strongly suggests that Jerry was involved in the crime (J.A. 41). Indeed, Norberto's testimony that Jerry "never told me anything of what had happened," when viewed in context, necessarily implies that Jerry was present during the crime (J.A. 45).

** Petitioner's statement that he had been shot was corroborated by Norberto, who observed him wearing a blood-stained bandage on his arm (J.A. 32-33). While petitioner faults the prosecution for failing to further corroborate the fact that he had been shot, it must be remembered that petitioner declined his friend's offer to take him to the hospital (J.A. 35). Thus, the fact that no medical records were available merely corroborates Norberto's testimony that petitioner opted not to seek professional medical attention. Moreover, the fact that Norberto stated that petitioner wore a bandage on his right arm (J.A. 33), while Benjamin asserted that petitioner was shot in the left arm (J.A. 67), does not render Norberto's testimony less reliable. To the contrary, as the New York Court of Appeals succinctly observed, variations in human recall are to be expected and, ". . . as a practical matter the evidence of witnesses is usually more suspect if they harmonize too closely" (J.A. 83). *See Lee* v. *Illinois*, 90 L.Ed.2d at 535 (Blackmun, J., dissenting).

motive to "frame" him because he suspected that petitioner was involved in his brother's homicide [petitioner's brief, p. 27]. This argument was not only rejected by the jury at trial, but implicitly by the Appellate Division of the New York State Supreme Court, which silently affirmed petitioner's conviction, and explicitly by the New York Court of Appeals, which held that "[t]here is nothing in the record to support this claim" (J.A. 84). Clearly, the Court of Appeals was correct, since petitioner's entire argument is based on Norberto's statement that petitioner "tried to take me to the place where they killed my brother" (J.A. 46). This single ambiguous line of testimony simply does not support petitioner's claim that Norberto suspected him as one of his brother's killers. To the contrary, Norberto's statement reveals that he believed that some other "they" killed his brother and that petitioner, a close friend, was merely taking him to the place where it occurred.* Furthermore, when petitioner attempted to impute to Norberto this fallacious motive to lie, by directly inquiring: "You don't like Eulogio, do you?" petitioner's friend of twenty-five years, apparently not understanding why such an accusation would be made, simply replied: "Why not?" (J.A. 46). Thus, if petitioner was involved in the Jerry Cruz homicide, Norberto was certainly unaware of that fact.

Finally, petitioner's secondary attempt to demonstrate Norberto's alleged unreliability falls far short of any recognized legal standard. While petitioner claims that Norberto had a "prior record" [petitioner's brief, p. 27-28], the fact that the witness had an eight-year-old conviction for driving without a license (J.A. 36-37) surely does not

* At the first trial, Norberto expressly stated that he did not suspect that petitioner was involved in his brother's death (minutes of first trial, pp. 180, 185-86).

seriously undermine his credibility.* *See, e.g., Dutton* v. *Evans*, 400 U.S. 74 (1970).

In conclusion, since petitioner confessed his guilt to an extremely reliable citizen witness, and since that confession was thoroughly substantiated by the objective evidence introduced at trial, petitioner could not have been devastated by the speculative possibility that the jury would fail to adhere to the trial court's numerous limiting instructions.** Thus, the introduction of petitioner's codefendant's interlocking confession was in accordance with this Court's decision in *Bruton*. *Parker* v. *Randolph*, 442 U.S. 62 (1979). Accordingly, the State submits that the Court may affirm the judgment on this basis as well.

* While petitioner also faults Norberto for receiving welfare payments "even as he plied his trade on the street as a mechanic" [petitioner's brief, p. 27-28], it was never established, on cross-examination, that it is illegal for a welfare recipient to supplement his income. In fact the New York Social Services Law specifically provides that an individual may supplement his support payments by working and that the head of a family such as Norberto Cruz, could earn more than $500.00 per month and still be eligible for public assistance [N.Y. Social Services Law §§ 131, 131-a (McKinney 1983)].

Similarly without merit is petitioner's claim that at his first trial, Norberto attributed the only confession to Benjamin [petitioner's brief, p. 28]. Indeed, the record of the first trial unequivocally demonstrates that Norberto always maintained that petitioner and Benjamin confessed separately (*see* minutes of the first trial, pp. 149-53). Moreover, at the second trial, Norberto again denied that only Benjamin Cruz confessed (J.A. 50-51).

** Petitioner's claim that the prosecutor, on summation, urged the jury to look to Benjamin's videotaped confession to corroborate Norberto's testimony regarding petitioner's confession, is inaccurate (petitioner's brief, p. 29). Indeed, the prosecutor, responding to petitioner's attack on the credibility of Norberto Cruz, merely argued to the jury, that Benjamin's videotaped confession substantiated Norberto's version of Benjamin's earlier confession (J.A. 57). At no time did the prosecutor ask the jury to use the videotape to corroborate petitioner's confession to Norberto Cruz (J.A. 57-58).

C. Even if the admission of Benjamin Cruz' confession was error, it was harmless beyond a reasonable doubt.

Because a defendant is "the most knowledgeable and unimpeachable source of information about his past conduct," his own confession is "probably the most probative and damaging evidence that can be admitted against him." *Parker* v. *Randolph*, 442 U.S. 62, 72 (1978), *citing Bruton* v. *United States*, 391 U.S. at 139-40 (White, J., dissenting). In the case at bar, the prosecution laid before the jury the most powerful evidence of petitioner's guilt—his confession to his childhood friend Norberto Cruz. Petitioner, bleeding from the gunshot wound to his arm, appeared at his friend's apartment, which was in the vicinity of the crime scene, and nervously confessed his role in the murder of Victoriano Agostini. Petitioner admitted that he went to rob a gas station and that he became involved in a struggle with the attendant. He explained how the attendant bent down and shot him in the arm and told of his brother's act of jumping up and shooting the attendant. Standing alone, with nothing more than the dead body, this devastating admission was sufficient to prove that petitioner committed the crime of felony murder [N.Y. Penal Law § 125.25 subd. 3 (McKinney 1975)]. *See, e.g., People* v. *Lipsky*, 57 N.Y.2d 560, 443 N.E.2d 425 (1982); *People* v. *Davis*, 46 N.Y.2d 1780, 386 N.E.2d 823 (1978).

At trial, however, petitioner's confession did not stand alone. As already discussed in detail [*ante* at 25-27, 43], petitioner's statement was reinforced by the objective evidence at trial, so that any attempt to discredit or disclaim it would have to fail. Through the admission of forensic, ballistic, and photographic evidence it became clear to the jury that the struggle described by petitioner did in fact occur. The trajectory of the bullet wounds to the deceased's head confirmed that the attendant "bent down" and that Benjamin "jumped up" to shoot and kill Mr. Agostini. Even petitioner's statement that he had been shot was independently established through the cross-examined testimony of Norberto Cruz, a witness with no motive to falsely accuse petitioner. Clearly then, as was true in *Harrington* v. *California*, 395 U.S. 250, 254 (1969), unless this Court were to say that no violation of the *Bruton* rule could be harmless error, the judgment of the New York Court of Appeals must be affirmed. *See Schneble* v. *Florida*, 405 U.S. 427, 430 (1972) (introduction of codefendant's confession is harmless error where defendant's confession was consistent with the objective evidence and where the rope burns on his hands inextricably linked him to the homicide); *see also United States* v. *Coachman*, 727 F.2d 1293, 1297 (D.C. Cir. 1984) (admission of codefendant's confession is harmless error where defendant's confession was corroborated by the physical evidence).

Against this backdrop, petitioner is hard-pressed to demonstrate exactly how he could have been prejudiced by the admission of his codefendant's confession, which merely mirrored his own. Thus, petitioner, unable to state with specificity what element of felony murder his brother's confession could have proven that his own confession did not, sees fit to argue, not that his confession was incomplete, but that the witness who reported it was unworthy of belief. However, as already discussed, petitioner's claim that Norberto Cruz had a motive to lie was supported by nothing more than petitioner's erroneous assertions—not a shred of evidence suggested that Norberto had a motive to falsely accuse petitioner.

Petitioner, again without discussing the substance of the respective confessions, argues that because his brother's confession was longer, the jury would naturally look to it to resolve its doubts about petitioner's confession. This

analysis is flawed for several reasons. First, it circumvents the most essential aspect of the Court's inquiry—whether Benjamin's confession materially altered petitioner's own account of his participation in the crime. On this crucial issue, petitioner is unable to demonstrate any significant difference between the two confessions.* True, Benjamin's confession was longer, but that was due in large part to the prosecutor's unsuccessful attempt to elicit information about the whereabouts of petitioner and the other members of the crime team. Benjamin's confession was also lengthier, since he provided extraneous details of the crime, completely unrelated to petitioner's involvement. Thus, petitioner could not have been prejudiced by the admission of his codefendant's confession since there was nothing in its content that the jury could look to that would strengthen the prosecutor's proof of petitioner's guilt. As Justice Blackmun has astutely noted, it is for this reason that "in most interlocking confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt." *Parker* v. *Randolph*, 442 U.S. at 79 (Blackmun, J., concurring). Surely, the present case is no exception to this rule.

Petitioner's claim of prejudice also rests on the faulty assumption that the jury would naturally have doubts about petitioner's confession and would therefore look to the purportedly more reliable videotape. Clearly, as respondent has stressed throughout, there is no sound reason to conclude that the jury would doubt petitioner's spontaneous outpouring of guilt in the presence of his codefendant to

* While Benjamin related that petitioner fired an errant shot at the attendant, this fact did not in any way supply additional proof of petitioner's guilt. Since petitioner was charged with felony murder, his intent to kill the attendant was a non-issue at trial. Thus, petitioner's admission that he intended to commit a robbery and that his brother shot the attendant, in conjunction with the physical, ballistic, and forensic evidence, was more than sufficient to establish his guilt.

his close friend and attach a greater degree of confidence in the custodial interrogation of petitioner's brother. To the contrary, this Court has, in various contexts, held that a confession of guilt to a friend or even a jailhouse associate can be the most powerful and reliable type of admission since it is motivated only by the defendant's desire to confess. *See Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Dutton* v. *Evans*, 400 U.S. 74 (1970). This is especially true here, since petitioner not only confessed himself, but tacitly acknowledged the truth of his brother's statement to Norberto Cruz by failing to contradict him. *United States* v. *Ruff*, *supra*. Under these circumstances, it is hard to imagine that the jury would attach a greater degree of reliability to Benjamin Cruz' confession, especially since Benjamin attacked the voluntariness of his confession at trial. While respondent agrees that Benjamin's argument that his confession was involuntary is as devoid of merit as petitioner's claim that he never confessed, the fact remains that there is no reason for this Court to assume that the jury would find Benjamin Cruz' confession more reliable than petitioner's own admission of guilt.

In sum, there is no doubt that petitioner's confession fully interlocked with that of his codefendant. *Lee* v. *Illinois*, 476 U.S. ——, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986); *Parker* v. *Randolph*, 442 U.S. 62 (1979). Petitioner's confession, which was made to Norberto Cruz, an extremely reliable witness, provided more than sufficient proof that he committed the crime of felony murder. Petitioner's claim that Norberto suspected that petitioner was responsible for the death of his brother, Jerry, was properly rejected by the jury and by the New York State appellate courts, since there was no evidence in the record to support this fantasy. In fact, the record of both trials clearly establishes that, contrary to petitioner's reasoning,

Norberto never even entertained the notion that his childhood friend could be involved in that crime. Significantly, the objective evidence at trial corroborated petitioner's confession in minute detail and the circumstances surrounding its utterance only reinforced the reliable nature of the admission. Since Benjamin Cruz' interlocking confession could add nothing to this vast array of evidence and was, at most, merely cumulative [*Brown* v. *United States*, 411 U.S. 223, 231 (1972); *Harrington* v. *California*, 395 U.S. at 254], there was no "reasonable possibility" that Benjamin Cruz' confession contributed to petitioner's conviction. *Schneble* v. *Florida*, 405 U.S. at 423. Here, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of Benjamin Cruz' confession so insignificant by comparison, that it is clear beyond a reasonable doubt that the introduction of the codefendant's thoroughly substantiated, materially interlocking confession, if error at all, was harmless error. *Harrington* v. *California*, *supra*.

Accordingly, the State submits that the Court may affirm the judgment on this basis in addition to the others urged by respondent.

Conclusion

The judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451
(212) 590-2060

PETER D. CODDINGTON
LEE S. GAYER
Assistant District Attorneys
Of Counsel

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